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AUG 22 1927
CHARLES ELMORE CRO
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In the Supreme Court
OF THE
United States

No. 473

SOUTHERN PACIFIC COMPANY, a corporation,
Petitioner,

vs.

MOORE SHIPBUILDING COMPANY, a corporation, and ROLPH NAVIGATION & COAL COMPANY, a corporation, as Claimant of the Tugs "Relief" and "Hercules",
Respondents.

Petition and Brief for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

(Identical petitions and briefs are filed in Southern Pacific Co. v. Moore Shipbuilding Co., et al., and Southern Pacific Co. v. Haglund etc. Both Petitions are based on errors of law in the single opinion for both cases and on record in Moore case.)

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Southern Pacific Company, represents to this Honorable Court that:

On February 24th, 1921, at about noon, the Southern Pacific Steam Ferryboat, Thoroughfare, running between San Francisco and Oakland, California, through the narrow channel of Oakland Estuary, and steaming easterly on the southerly side of the channel, collided with the stern of the Steamer Enterprise, lying at about right angles across the channel and obstructing the view of the channel. The Enterprise was without officers or lookout and was held in her position across the channel by the tug Relief lying alongside on the westerly side of the Enterprise and in her full charge. As a result of the collision damage was done to both the vessels and a workman named Ernest Haglund, standing at the stern of the Enterprise, was killed.

The Moore Shipbuilding Company, in possession of the Enterprise, libeled the Thoroughfare for the damage to the Enterprise's stern, in the District Court for the Northern District of California, and the Southern Pacific Company appeared and claimed its Steamer and, by a third party petition, joined the Rolph Navigation & Coal Company, the owner of the tug Relief, and the Relief. In another suit, in the same court, the administratrix of Haglund libeled the Southern Pacific Company and Rolph Navigation & Coal Company for Haglund's death. The Moore Company's libel was tried first and decree entered for the libelant against the Southern Pacific Company and the proceedings were dismissed as to the Rolph Navigation & Coal Company and the tug Relief. The Haglund libel was submitted upon the evidence in the Moore libel and decree was entered in favor of the

administratrix and against the Southern Pacific Company and the libel dismissed as to the Rolph Navigation & Coal Company. Appeal from both decrees was taken to the Circuit Court of Appeals where the two causes were consolidated for hearing. The amount of damages decreed in both cases was accepted without dispute and the sole question submitted to the court was whether the Southern Pacific Company was liable at all or for divided damages with the Relief and the Enterprise. The Circuit Court of Appeals affirmed the decrees of the District Court and filed a single opinion for both cases, making certain additional findings of fact and incorporating all the findings of fact and conclusions of law of the District Court in the Moore case.

The Southern Pacific Company has filed petitions for certiorari in both the cases. The petitions raise no question as to the amount of damage sustained, but are concerned solely with the question of responsibility of the Southern Pacific Company and its Steamer, the Thoroughfare, and the tug Relief and Steamer Enterprise for the collision.

The evidence taken in the District Court appears in the first of the above cases, *Southern Pacific Company v. Moore Shipbuilding Company, et al.* There are no references to the evidence in this petition which is confined to the findings of fact and conclusions of law in the opinion. The opinion is printed in the record in both cases here, but the pages referred to in the petitions and briefs are the pages of the record in the

proceedings here against the Moore Shipbuilding Company.

The statement of questions involved in the petitions.

Your petitioner further represents that the petitions here involve two questions, the decision of which vitally concern the safety of life and of property in steamships on the navigable waters of the United States. They are as follows:

(1) Has there been an abandonment of the *F. W. Wheeler* rule of the Sixth Circuit, decided by Judge Lurton and concurred in by Judge Taft, and agreed in by the Second and Fourth Circuits, that a vessel owes a positive duty to an approaching steamer, signalling for a passing maneuver, to warn the latter of a danger known to the former and unknown to the latter? Can such a vessel accept the passing signal and escape even divided responsibility for damage to her, where the damage is held to be "caused" by the attempt of the signalling vessel to escape the danger suddenly disclosed to her?

(2) Has there been an abandonment of the rule of this court in the *Ariadne,* declaring the duty of lower courts in collision cases involving the absence of a lookout, as follows:

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his

vessel with all the property and the lives of all on board. * * *

It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performane of the duty, and the effect of non-performance, **should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."**

The Ariadne, 13 Wall. 475 at 478-9, 20 L. Ed. 542 at 543.

May an admiralty court ignore the absence of a lookout on a steamer obstructing a narrow channel, where (1) the commands affecting her are given by the captain of a tug, on her port side, who cannot see what is happening on her starboard side; and where (2) a collision with the steamer is held to be "caused" by the attempt of another vessel, approaching from the port side, to escape from a theretofore unseen approaching vessel on the starboard side, whose movements have been hidden for a "few minutes" from the tug captain; and (3) where the tug captain accepted a signal for a passing from the colliding vessel and failed to blow a danger signal, without the information he would have received from a lookout above him on the deck of the obscuring steamer, who would have known of the increasing danger from the unseen vessel on the starboard side?

On the opposite page is a drawing, illustrating the positions of the approaching Union, concealed from the Thoroughfare and Relief by the Enterprise, as found by the Circuit Court of Appeals, and under it is a summary of the pertinent facts as found in the opinion and of the errors in stating the duty of a vessel in the tug's position and in the failure to apply the rules of the *"F. W. Wheeler"* and *"Ariadne"* decisions.

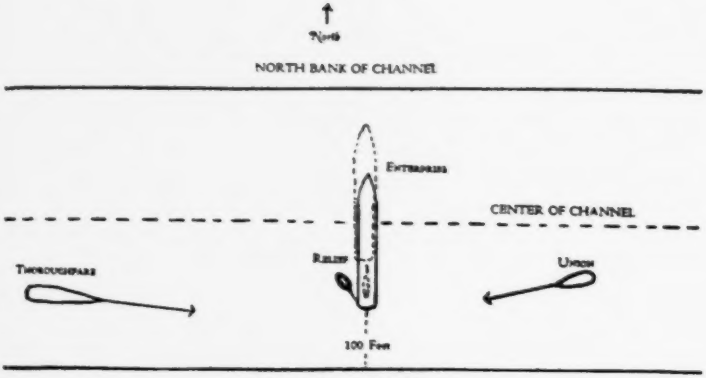
BRIEF ON FIRST QUESTION—ON A VESSEL'S DUTY TO WARN OF HIDDEN DANGERS.

The whistle acceptance of a tendered passing signal is a positive assertion that no danger exists which is known to the accepting vessel and concealed from the vessel signalling for the maneuver. If there is such a danger, the vessel knowing it owes a positive duty to the asking vessel to blow the danger signal. A vessel knowing of such concealed danger and accepting a passing signal and failing to blow the danger signal is in fault and is responsible for a collision "caused" by the hidden danger.

The tendering vessel may rely on the assurances of the accepting vessel and is not at fault for damages arising from proceeding as if the hidden danger were not there.

The contrary rule, laid down by the Ninth Circuit in this case, is opposed to the rule as established in the Sixth, Fourth and Second Circuits and all other cases. It is not the law and is a menace to life and property at sea.

The opinion of District Judge Sawtelle, for the Circuit Court of Appeals, holds that no obligation rests on the tug to disclose the presence of the hidden ap-



Enterprise without lookouts, lying across narrow channel of Oakland Estuary, hid oncoming Union from Thoroughfare and Relief at the time Relief accepted Thoroughfare's passing signal, instead of blowing danger signal; but Relief had seen oncoming Union on wrong side of channel when towing Enterprise (as shown by dotted lines) from a dock lying to the northerly. Relief without aid of lookout for "a few minutes" before accepting passing signals, fails to blow danger signal.

Opinion finds collision between port side of Thoroughfare and stern of Enterprise "was caused by the Thoroughfare turning to port before she had cleared the Enterprise in order to avoid meeting the oncoming Union" (Tr. 406), and that "when the Relief blew its one blast in reply to the signal of the Thoroughfare the master of the Relief was aware of the presence of the Union, and the master of the Thoroughfare was not"; (Tr. 406) but,

finds "no authority for holding the Relief responsible for not advising the Thoroughfare of the presence of the Union, or for accepting the Thoroughfare's maneuver knowing that the Union was coming down the channel." (406).

Chief Justice Taft concurred with Justice Lurton, then both Circuit Judges, in holding (exactly contrary to Judge Sawtelle), that in such a situation the tug does owe such a duty to warn the approaching vessel of the hidden danger in

F. W. Wheeler (C. C. A. 6) 78 Fed. 824, (infra with many others).

Opinion finds "absence of lookout" but fails to consider or apply rule in

"Ariadne," 13 Wall. 475 at 478.

proaching vessel, and that she need not blow the danger signal, but may properly accept a passing signal. It does not hold the tug liable even for half damages, although he specifically finds that the "cause" of the collision with her tow was the ferry's turn to avoid the suddenly seen oncoming vessel, of whom she had failed to give warning. The pertinent portions of the opinion of the Circuit Court of Appeals is as follows:

> "SAWTELLE, District Judge.—The collision in question took place on the 24th day of February, 1921, at about noon. The steam ferryboat Thoroughfare, running between San Francisco and Oakland, California, through Oakland Estuary, and sailing easterly on the southerly side of the channel, saw the steamer Enterprise with the tug Relief attached to her stern lying across the channel with her stern toward the southerly shore. The Thoroughfare when about one thousand feet from the Enterprise sounded one blast of her whistle which signal was not answered. A few minutes* thereafter the Thoroughfare sounded a second passing signal, which was accepted with one blast from the Relief. The Thoroughfare then attempted to pass between the stern of the Enterprise and the edge of the navigable channel on the south shore, a space of about one hundred feet. After the exchange of signals and continuously thereafter until the collision occurred, the Enterprise was dead in the water.
>
> The tug Union was approaching the opening from the easterly side. She was located to the

*This makes Thoroughfare's speed of approach less than 5 knots, a slow rate of speed. A "few minutes" is at least two, in which she moved less than 1,000 feet. This is what the opinion says to the shipping world whatever higher speed may be argued from in the record. The propriety of her speed is, of course, dependent on her right to rely on a warning of a danger unknown to her, but which would have been known to the Relief, when she blew her assenting whistle, instead of a 4 blast danger signal.

southerly of the center of the channel (wrong side). Between the time of the exchange of signals and the collision there was no lookout on the Enterprise. The master of the Relief knew that the Union was approaching the Enterprise from the opposite direction, but the master of the Thoroughfare was without such knowledge. The Thoroughfare, when about halfway through the opening between the Enterprise and the edge of the channel, swung to port, and collided with the stern of the Enterprise; thereby damaging the latter vessel and killing Ernest Haglund, one of her workmen." (Tr. 401, 402; parenthesis inserted.) * * *

"The collision was caused by the Thoroughfare turning to port before she had cleared the Enterprise in order to avoid meeting the oncoming Union. **I find no authority for holding the Relief responsible for not advising the Thoroughfare of the presence of the Union, or for accepting the Thoroughfare's maneuver knowing that the Union was coming down the channel.** It is a fact, however, that when the Relief blew its one blast in reply to the signal of the Thoroughfare the **master of the Relief was aware of the presence of the Union, and the master of the Thoroughfare was not."** (Tr. 406.) * * *

"When the Thoroughfare's whistle blew for the second time one short blast and the tug Relief answered it the Relief had taken the sternway off the Enterprise and was holding her practically dead in the water, and there was room for the Thoroughfare to pass between the stern of the Enterprise and the edge of the navigable channel. This situation was apparent to the master of the Thoroughfare and his signal under all the existing conditions signified his intention to direct his course to starboard, and **no obligation was placed**

> **upon or assumed by the Relief to do anything other than to prevent such a change of position on the part of the Enterprise as would interfere with the maneuver selected by the Thoroughfare —that is to say—to pass between the stern of the Enterprise and the edge of the channel."** (Tr. 405).

The opinion then finds the Thoroughfare solely at fault for approaching and attempting to pass through this opening where "there was room for her to pass" at a "full speed", which speed is found by the opinion to be less than "1,000 feet" in a "few minutes."

Obviously, there was no danger in passing through an opening, through which "there was room for the Thoroughfare to pass", except for the presence of the unseen oncoming Union on the south and wrong side of the channel. The danger was not in the wide enough opening, but in the concealed Union.

Equally obvious is the absence of fault in attempting to pass through that opening after the Relief, who had made and controlled the opening, assented to the one blast signal for permission to pass, *unless the Relief owed the Thoroughfare no duty to advise her of the presence of the Union on the wrong side of the channel, where the Thoroughfare would not expect her to be.*

Our contention is that the Relief did owe such duty to the Thoroughfare and that conclusion of law that she did not, is contrary to the law as laid down by Judge Lurton in the *"F. W. Wheeler"* case in the

Sixth Circuit and in cases in the second and fourth circuits.

In that case, the Wheeler was towing a vessel which was sheering behind her. This was unknown to the Chamberlain, an approaching steamer. As with the Thoroughfare, the Chamberlain blew one blast for permission to pass. Instead of blowing a four blast danger signal, the Wheeler consented to the passing by blowing one blast. As a result the Chamberlain proceeded under the whistle consent and collided with the Wheeler's tow.

Judge Lurton, (Judges Taft and Sage concurring) after stating, *inter alia,* concerning the facts:

> "The district court held that, on the theory of the respondents, the Wheeler was guilty of a fault in accepting a passing signal when unable to control her own movements or those of her consort, and in not sounding an alarm to the Chamberlain to put her on guard against the known dangerous situation of both herself and her consort," (p. 826),

finds the duty to blow a danger signal and not to accept a passing signal, where there is such a concealed danger in the following language:

> "The rules of navigation found in Section 4233 of the revised statutes furnish, therefore, the rules under which this case must be tried.
>
> What was the duty of the Wheeler if the situation was that claimed for respondents when the Chamberlain was seen to be coming down this narrow channel, on a course so nearly parallel to that of the Wheeler as inevitably to result in a collision, if persisted in, with the Ashland, then

aground, as claimed by respondents, off her port quarter. * * *

The inability of the Wheeler to control her movements, or those of her consort, which had sheered across the course of the vessel coming down, **imposed on the master of the Wheeler the duty of warning the approaching vessel of the danger of the situation. He had no right by lights and signals to give the Chamberlain to understand that her course was clear to pass port to port without greatly changing a course** which was manifestly so 'end on' or 'head and head' with himself as to certainly bring him in collision with his helpless consort off his port quarter,—a collision which neither the Wheeler nor the Ashland could avoid by any movement of their own. **Special circumstances existed, known to the Wheeler, and not known to the Chamberlain, which required prompt attention, and warning should have been given to the Chamberlain that she might adopt proper precautions. The acceptance of the signal given by the Chamberlain was clearly misleading, for it gave her the right to understand that she could pass safely on the port side of the Wheeler** and that her consort was under control, and would be no hindrance if she passed as proposed."

F. W. Wheeler, 78 Fed., 824, at 827, 828, 829.

Contrast this with Judge Sawtelle's opinion in which he finds "no authority for holding the Relief responsible for not advising the Thoroughfare of the presence of the Union, or for accepting the Thoroughfare's maneuver knowing that the Union was coming down the channel."

Below it was argued that the *F. W. Wheeler* rule did not apply because the duty there described was

to disclose the presence of a *different kind* of concealed danger: to-wit, a sheering tow instead of an oncoming steamer. It is the quality of *danger,* whatever it may be, *unknown* to the vessel signalling for a passing and its presence, and *known* to the accepting steamer, which imposes the duty to blow a danger signal and not accept the passing.

The law as so laid down in the ninth circuit is in conflict with the *Edna V. Crew,* decided by the Circuit Court of Appeals for the fourth circuit. That court adopts in full District Judge Waddill's opinion below, which lays down the duty in a case exactly in point.

There, as her, the tug, with a vessel in tow, received a two whistle passing signal and, instead of claiming her privilege by four whistles, responded with two blasts, thereby acquiescing in the maneuver. A third vessel made the maneuver dangerous to the tow and the approaching vessel, who blew the first whistle, just as the Union made it dangerous to the Enterprise, the tow, and the Thoroughfare, the approaching and signalling vessel. The court held that in these circumstances the tug should not have accepted the passing signal and should have blown the danger signal. The court says:

> "The Portsmouth sounded her two whistles, indicating her purpose to pass to starboard, and proceeded to navigate with that end in view. The Crew evidently saw no objection to the course adopted by the Portsmouth, and **responded with two signals, thereby acquiescing in the course**

adopted. Having so accepted those signals, it was the duty of the Crew to have starboarded, and gone to port, with a view of avoiding risk of collision.

The Crew now insists that, in accepting the signals, she was under no necessity to do more than not obstruct or embarrass the Portsmouth in her movements; and, in any event, by reason of the Dixie being to her port, she could not have starboarded and gone further to the north, and that the collision would not have occurred had the Portsmouth not again changed her course by porting, to avoid collision with the Juniata. **The court does no concur with the position of the Crew that no obligation was imposed on her further than not to embarrass or obstruct the Portsmouth.** On the contrary, she should have starboarded her helm and gone to port, after acquiescing in the Portsmouth's signal to pass starboard to starboard.

The sounding of the two reply whistles clearly indicated that there was then no obstruction which would have prevented her accepting the Portsmouth's signals to pass starboard to starboard. Had there been such difficulty, the Portsmouth's signals should not have been accepted by the Crew, and, instead, the latter vessel should have indicated to the former the difficulties in the way, by giving danger, instead of passing, signals. This was especially true in the then condition of the channel, and the wind and tide. **The Crew should have recognized that the Portsmouth** with her tow was meeting two tugs and tows running practically abreast, one of the other, and, further, that an ocean steamship was also ahead of her, and **that she must navigate with reference to them all."**

The Edna V. Crew, 182 Fed. 890, at 892-893, opinion adopted (C. C. A. 4) 202 Fed. 1022.

The significant language is "the sounding of the two *reply* whistles clearly indicated that there was no obstruction which would have prevented her accepting the Portsmouth's signals to pass starboard to starboard". So, in this case, the sounding of the one reply whistle clearly indicated that there was no obstruction which would have prevented the Relief accepting the Thoroughfare's signal to pass port to port. Contrast this with the language of Judge Sawtelle's opinion:

> "I find no authority for holding the Relief responsible for not advising the Thoroughfare of the presence of the Union, or for accepting the Thoroughfare's maneuver knowing that the Union was coming down the channel." (Tr. 406)

The further significant language is that:

> "Had there been such difficulty, the Portsmouth's (Thoroughfare's) signals should not have been accepted by the Crew, (Relief) and, instead, the latter vessel should have indicated to the former the difficulties in the way, by giving danger, instead of passing, signals."
>
> *Edna V. Crew,* (C. C. A. 4) 182 Fed. 890, at 893.

This should be contrasted with Judge Sawtelle's language as follows:

> "no obligation was placed upon or assumed by the Relief to do anything other than to prevent such a change of position on the part of the Enterprise as would interfere with the maneuver selected by the Thoroughfare—that is to say—to pass between the stern of the Enterprise and the edge of the channel." (Tr. 405)

The rule as declared in the ninth circuit is also in conflict with the decision of the *Lowell M. Palmer* by the Court of Appeals of the second circuit, where the following is stated:

> "When the Palmer blew her two whistles, indicating a desire to pass to starboard, the master of the Wrestler knew that the Palmer was proceeding on the Brooklyn side of the channel in violation of the statute. He also knew, or it was his business to know, what was the condition of the tide and eddy in the river at that time and place. If by reason of the position of the Palmer, **the request evidenced by the signal of two whistles was likely to embarrass the Wrestler in her movements, she had the right, as the privileged vessel, to refuse to comply therewith."**
>
> *The Lowell M. Palmer,* (C. C. A.) 142 Fed. 937, at 941.

The rule laid down in the *Edna V. Crew* in the Court of Appeals for the fourth circuit appears in three District Court decisions in that circuit holding that it is the duty of a vessel presented with a possible maneuver to blow danger signals to indicate dangers known to her and not to the other vessel. In *The Richmond* (275 Fed. 970) the following statement of facts was accepted by the court:

> "that as the schooner came close to and rounded the Hock, for the first time she observed the barge Champlain in tow of the tug Elsie, lashed alongside, proceeding down the river in such a position that the three vessels—the Richmond, the tug and tow, and the Hawarden—would pass about abreast of the Hock, the anchored barge, and in very close

> proximity to it; *that the schooner's view of the tug and tow had been obstructed by the barge Hock, though they were at all times in plain view of the Hawarden.* Upon perceiving the danger, and the impossibility of the Richmond holding her course without colliding with the tug and tow, or running into the anchored barge, the schooner sought to avoid collision by porting and slackening the spanker, believing that the steamship would keep out of the way, or at least slacken her speed, or stop, or reverse. But she did neither, and continued under a starboard helm, without slackening speed, or stopping, or reversing, or giving any warning whatever, causing the Richmond and Hawarden to come in collision; the steamship's starboard bow striking the schooner's stem and headgear with great force" (971),

and the Steamer Hawarden is found in fault for not blowing a danger signal to warn the schooner of the danger unseen by her, as follows:

> "With the vessels only the length of the ship apart, she should have done more than starboarded (The Manaway (D. C.) 257 Fed. 476, 477); she should have slackened her speed, stopped, or reversed, and *given danger signals, indicating the situation as it existed.* Had she done so, she would not have had to depend upon her inability to do something effectual to avoid the risk of collision, after the sailing vessel made, according to the ship's claim, the second effort to run into her, by porting her wheel. The vessels at this last-named period were virtually in collision, and what was done at that time by the schooner and the steamship should be treated as error in extremis."

In construing the applicable articles for the prevention of collisions:

"Art. 27. In obeying and construing these rules due regard shall be had to *all dangers of navigation and collision,* and to *any special circumstances* which may render a departure from the above rules necessary in order to avoid immediate danger."

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of *any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.*" Comp. St., Sections 7859-7862, 7866, 7868,

the court holds:

"*The steamship did not observe these regulations. She knew, and the schooner did not, of the presence of the Elsie and the Champlain, as they were navigating in close proximity to her starboard, coming down from the Engineer pier.* She knew, and was charged with knowledge, of the presence of the Hock at anchor, and of the other two barges near thereto, at the time closely on the eastern side of the channel; and there was no excuse for the ship, with the entire channel otherwise open, to have so navigated as to have thrown her into a position of danger with these several anchored, incumbered, and moving vessels, with all of which, as before stated, she was charged with avoiding collision, or the risk thereof. Her negligence in this respect brought about the collision with the schooner, *without neglect or fault,* so far as the court can see, on the part of the schooner or any of the vessels mentioned."

The Richmond, 275 Fed. 970, at 975.

In the Alabama the same District Judge says:

> "This conduct on its part monopolized more of the fairway of the channel than was reasonable, and at least imposed upon it (assuming that room enough, at that particular time, was left for the outgoing shipping to pass to port, and down the western side of the channel, instead of to starboard) the obligation to take every possible precaution, *and, if need be, to give danger signals,* upon the steamer's approaching it, in order to avoid injury to others."
>
> *The Alabama,* 114 Fed. 214, at 218.

In the Second Circuit, Judge Thomas, then in the Eastern District for New York, agrees with the rule laid down by his Circuit Court of Appeals in the following language:

> "As to the first claim, it is sufficient that the vessels themselves *settled the manner of passing each other,* and, considering the distance between them, the Ward did not act under duress. If the Ward regarded the maneuver as faulty, *her captain should have blown alarm whistles* and stopped the proposed passing compelling the Tice to go about, or otherwise dispose herself."
>
> *The Luther C. Ward,* 149 Fed. 787, at 788.

Judge Adams for the Southern District of New York states the rule as follows:

> "The evidence satisfies me that while there was an effort on the part of both vessels to perform the agreement, that of the tug failed. *The tug should in the beginning have indicated that she did not consider it safe to attempt to pass to the right and instituted another course or should have responded to the one whistle signal*

of the steamer by an alarm, indicating that the tug could not undertake the proposed maneuver. Under such circumstances the steamer, according to the pilot's testimony, would have waited under Negro Point and done exactly what the tug now contends she should have done.

There will be a decree dismissing the libel of the tug and sustaining that of the steamer, with an order of reference."

Werdenfels, 150 Fed. 400, at 406.

In the Third Circuit, the District Court of Delaware lays down the rule as follows:

"With respect to the Mehrer but little need be said. She as the leading tug was, to the exclusion of the Santa Maria, the Bristol and the Brandywine, entrusted with the selection of the course of navigation. Knowing that she had in tow a large and pondrous vessel impossible quickly to be diverted from the course she was pursuing she was *clearly in fault in assenting to and acting upon the single blast signal received from the Sweepstakes, instead of refusing to join in the proposed maneuver and promptly giving danger signals,* and slackening her speed as far as could be done with safety. Had she done so it is probable that the Sweepstakes would not have persisted in pursuing her eastward swing from the westerly side of the channel, and the collision might and probably would have been avoided."

The Santa Maria, 227 Fed. 156.

Other Cases.

In no circuit court of appeals and in no district court has the industry of the proctors representing the three groups of parties, found any case where a vessel

has not been held in fault, *where she has accepted a passing signal and failed to blow a danger signal,* to indicate a danger, known to her and unknown to the vessel requesting the passing maneuver.

The following cases were cited below by opposing proctors, to support the rule as laid down by the Ninth Circuit:

The Syracuse, 9 Wall. 672;
The Victory, 168 L. Ed. 410;
The New York, 175 U. S. 187, 44 L. Ed. 126 at 134;
The Maryland, 182 Fed. 829;
The Howard Reeder, (C. C. A.) 207 Fed. 929;
The Merrimac, 14 Wall. 199;
The Jersey City, 44 Fed. 112, aff. 51 Fed. 527;
The Westhall, 153 Fed. 1010;
Kent v. Eastern Dredging Co., 193 Fed. 808;
The John D. Rockefeller, 260 Fed. 982;
Navigation Co. v. Boston Virginia Transportation Co., (C. C. A.) 278 Fed. 868;
The Col. John F. Gaynor, (C. C. A.) 130 Fed. 856;
Britton S. S. Co. v. J. B. King Transportation Co., (C. C. A.) 131 Fed. 62;
The Lucille, 169 Fed. 719;
The Shinsi Maru, 266 Fed. 548;
The New York, 175 U. S. 207;
The Jamestown, 114 Fed. 593, 595;
The Edward G. Murray, (C. C. A.) 234 Fed. 61;

The America, 29 Fed. 304;
The Monterey, 165 Fed. 195;
The Paulsboro, 11 Fed. (2nd) 635.

All these are cases where either no passing signal was requested by the approaching vessel or where it was requested and no answer given. No one has any application to the question here involved.

Anticipation of possible argument that oncoming Union was not "present" and did not "cause" the collision.

It was argued below for the Relief, that the finding that it was the *"presence"* of the *"oncoming"* Union that *"caused"* the turn of the ferry into the Enterprise was erroneous. The argument was that the Union was not *present,* but so far distant that she did *not* cause the collision. It may be presented here.

Such an argument has to do with the facts in the record and outside the opinion and, we submit, will become pertinent here only after the granting of certiorari. As the opinion now stands to the shipping world and the men of the sea, the *presence* of the *oncoming* Union *did* cause the collision. Under the principle it declares, the master may know of such a danger to the ship in his charge and the men in his care and, without culpability, do nothing to protect her or them. More than this, by the acceptance of a passing signal from a vessel not knowing of the danger, he may *invite* her into a *trap,* where to extricate herself she will necessarily place his own vessel and the men on her in grave danger—here resulting in damage and death—without even a partial liability.

A decision embodying such an interpretation of the law of the sea should not be permitted to stand,—whatever may be the finding of facts by this court if *certiorari* be granted.

Submission on First Question.

Your orator therefore submits that the rule of navigation set forth in the opinion, on which rest the

"conclusive to the contrary" that the collision nevertheless must have occurred?

This court has stated the duty of the lower courts to be as follows:

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. * * *
>
> It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, **should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."**
>
> *The Ariadne,* 13 Wall. 475 at 478-9, 20 L. Ed. 542 at 543.

Instead of giving the "fullest effect" to the rule, the Circuit Court of Appeals ignores the absence of the lookout. Instead of resolving the non-performance of the duty against the Relief, until she vindicates herself by testimony conclusively to the contrary, it makes findings which show that she could not escape inculpation.

The probable reason for this is because it holds there was no duty to warn the Thoroughfare of the hidden danger and, hence, no right in the Thoroughfare to

proceed in any way other than as if the danger was there—and this although her passing signal was accepted. The opinion therefore finds that the approach of the Thoroughfare was negligence and

> "that such negligence was the proximate cause of the collision, and that the 'Thoroughfare' was solely responsible for the damages which resulted therefrom." (407).

This, we believe, was the reason, but if so it was bad reasoning. Even were the approach of the Thoroughfare the "proximate" cause of the collision, the failure in those "few minutes" to give warning by a vigilant lookout is not shown, conclusively to the contrary, not to have *contributed* to the collision.

The rule that the vessel without a lookout must show, conclusively, that his absence did not *contribute* to the collision, regardless of where the *proximate* causation lies, is clearly stated in the Second Circuit, where Judge Lacombe says:

> "As to the fault on the part of the schooner, she had no lookout and must be held in fault therefor, *unless she can show affirmatively that, if there had been a lookout, and he had done his duty in seeing and reporting other vessels, and the schooner had navigated in conformity with the information thus obtained, the collision would nevertheless have happened.* * * *
>
> The delay was short,—a fraction of a minute—but even that delay may have made impossible an escape which otherwise might have been secured. Had the schooner commited no other fault, we might be astute to find excuse for a delay so

> brief. *But, on the contrary, she was confessedly guilty of a very grave fault, navigating without a lookout, and in consequence of failure to keep a lookout, uninformed as to the location of the tow. The burden is on her to show that such fault did not contribute to the collision,* and in view of her master's failure to act promptly, when he did learn of the danger that impended, we are not satisfied that she has sustained that burden."
>
> *"The Anna W.",* (C. C. A.) 201 Fed. 58, at 60, 61, 62.

Would there have been a collision if the vigilant lookout had given some such warning as that suggested above? Or is it shown that his absence did not *contribute* to the collision? The mere finding that the Thoroughfare's act is the *proximate* cause does make it the *sole* cause and does not absolve the court from considering whether the absence of a lookout was not a contributing cause.

In the Third Circuit, the rule is stated as follows:

> "It was negligence, also, not to keep a proper lookout. Possibly, an earlier discovery of the approaching tug might not have availed, but this is not certain, and, unless it be clear that the absence of a proper lookout did not *contribute* to the collision, such absence is a fault."
>
> *"The International,"* 143 Fed. 468 at 471 (C. C. A. 3).

The stern mandate in the *"Ariadne"* case was made over fifty-five years ago. In those fifty-five years, the

number of vessels at sea and crowding our harbors has enormously increased. Nearly all of them are steam vessels moving at greatly increased rates of speed. The importance of prompt and increasing vigilance on the part of lookouts has correspondingly increased.

We submit that there is even greater need today for trial courts to heed the admonition of the *"Ariadne"*, and that *certiorari* should be granted here to renew its mandate in the protection of life and property at sea, as well as to resolve the differences between the ninth and the second and third circuits.

The contradictory findings of fact in the opinion are further evidence that the whole case was only casually considered below.

The opinion of the Circuit Court of Appeals has other evidences of a casual consideration of the entire case. It holds the Thoroughfare liable for acting on the accepted passing signal and proceeding towards and through the opening where "there was room for her to pass" (405) and where the only danger in passing, at full or any other speed, was some other vessel on the wrong side of the channel, known to the Relief when she was asked permission to pass, because the Thoroughfare was at "full" speed. It finds that "full" speed to be so slow, that it took a "few minutes" to cross less than 1000 feet of water (401); that is, less than 5 knots an hour if "few" means two minutes, or not over 3-1/3 knots an hour if few means at least three minutes. On the face of it, the opinion shows affirmatively no negligence in such a speed of approach—unless a ship can never agree on a maneuver with another, except at her peril.

One of the most important questions in this, as in most collision cases is the distance between the vessels at the time of the whistle exchanges.

Here the opinion finds the Thoroughfare guilty of negligence in failing to stop or reduce her speed when her first signal was unanswered (407). It finds that her *first* signal was blown at "1000 feet" distance, after which she advanced a "few minutes" before blowing the second (401). Obviously unless the Thoroughfare was proceeding at a snail's pace, she

must have been right on top of the Enterprise when she blew the second whistle.

Having made this finding it then proceeds to make an entirely contradictory one on exactly the same question. It "adopts" as "amply supported by the evidence", the finding of the District Court that the vessels were *"at least 1000 feet" apart when the* SECOND *whistle was blown.*

The findings parallel as follows:

Finding p. 401:

"The 'Thoroughfare' when about *one thousand feet* from the 'Enterprise' sounded one blast of her whistle which signal was not answered. A few *minutes thereafter* the 'Thoroughfare' sounded a *second* passing signal, which was accepted with one blast from the 'Relief'."

Finding p. 405:

"From the time that the 'Thoroughfare's' *second* single blast was blown and was answered by the 'Relief' there was no change in the position of the 'Enterprise'. For at least one thousand feet *thereafter* the 'Thoroughfare' advanced practically at right angles to the 'Enterprise' heading for the one hundred foot opening between the stern of the 'Enterprise' and the edge of the channel."

Can any opinion concerning the rules controlling passing maneuvers at sea, here involving both death and injury to property, and involving in the future thousands of lives at the same hazard, be called well considered which contradicts itself on such vital matters? Do a *few minutes* of steaming count nothing in a modern collision trial? And yet, here, the one finding places the point of making the passing agreement as

"minutes" of steaming from the place where another finding fixes the same exchange! Contrast with this what the second circuit says of the importance of "a fraction of a minute" in collision cases in the *The Anna W.*, (C. C. A. 2) supra p. 27.

It is not a matter for certiorari that such a contradiction exists, although on the face of the opinion. It is, however, of vital concern to the shipping public that its members feel that its causes are not indifferently reviewed, and that a law of collision, long established in opinions from tribunals made up of such judges as a Lurton and a Taft, should not be casually ignored as "no authority".

Nor is it surprising that, in such a mood, no attention was paid to the *Ariadne* decision and the strict injunction of this court to the lower courts, relative to the examination of the record in maritime disasters where there is no lookout on a participating vessel. In that case, the two lower courts concurred and, in reversing, this court said:

> *"The right of appeal to this court (or the Circuit Court of Appeals) is a substantial right, and not a shadow. It involves examination, thought and judgment.* Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect." (Italics ours. Parenthesis inserted.)
>
> *The Ariadne,* 13 Wall. 475, at 479.

We submit that the same character of "examination. thought and judgment" as shown in the contradictory findings of fact, caused the ignoring of the *F. W. Wheeler* and the *Ariadne* rules in determining the law of this case.

SUBMISSION.

In conclusion, we submit that these matters involving, as they do, a proper interpretation and application of the law controlling (1) all vessels who have exchanged passing signals, where one vessel knows of a danger unknown and uncommunicated to the other, and (2) the obligation imposed on vessels giving signals without the guidance of any lookouts, vigilant or otherwise, which rules and obligations will vitally affect the safety of life and property at sea in the future, are of sufficient importance to call for the extraordinary interposition of this court by *certiorari,* both in order to avoid the diversity of judgments of different circuits heretofore shown and to guard against inadvertence of conclusions in controversies concerning the responsibility for death and damage to property at sea.

Your petitioner furnishes as an exhibit to this petition, a certified copy of the entire transcript of record of the said case, including the proceedings in the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore, your petitioner respectfully prays that the two petitions for writs of *certiorari,* heretofore referred to, be heard together and that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to the Supreme Court, for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals in said cases, entitled Southern Pacific Company, a corporation, Appellant, vs. Moore Shipbuilding Company, a corporation, and Rolph Navigation & Coal Company, a corporation, as Claimant of the Tugs Relief and Hercules, Appellees; No. 4925 in the records of said court, and Southern Pacific Company, a corporation, Appellant, vs. Hildur Haglund, as Administratrix of the Estate of Ernest Haglund, deceased, and Rolph Navigation & Coal Company, a corporation, Appellees; No. 4926 in the records of said court; and that the said decrees therein of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet.

And your petitioner will ever pray.

WILLIAM DENMAN,
Attorney for Petitioner.

State of California,
City and County of San Francisco.—ss.

WILLIAM DENMAN, being duly sworn deposes and says:

That he is the attorney for Southern Pacific Company, the petitioner in the above cause; that he has prepared the foregoing petition and the facts therein stated are true as he verily believes.

WILLIAM DENMAN.

Subscribed and sworn to this 17th day of August, A. D. 1927.

(Seal) KATHRYN E. STONE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires March 1, 1929.

In the Supreme Court
OF THE
United States

FILED
SEP 17 1927

OCTOBER TERM, 1927

No. 473

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,

vs.

MOORE SHIPBUILDING COMPANY (a corporation), and ROLPH NAVIGATION & COAL COMPANY (a corporation), as claimant of the tugs "Relief" and "Hercules",
Respondents.

REPLY OF RESPONDENT, MOORE SHIPBUILDING COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Respondents.

REPLY OF RESPONDENT, MOORE SHIPBUILDING COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI.

The duty in preparing this reply, opposing the petition for a writ of certiorari, has been defined by this Court in the case of *Furness Withy & Co. v. Yanz-Tsze Insurance Association,* 242 U. S. 430, as being incumbent upon counsel for both sides to see that the petition and reply thereto disclose the real situation. We are mindful also of the admonition of the same case that

> "unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity, and clearness,* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket".

The statement of facts in the first paragraph on page 2 of the petition makes it appear that the essential facts are that the "Enterprise" was obstructing the channel by lying at right angles across it and that she was without officers or lookout. The following statement will, we think, convey a better idea of the true situation.

On the 24th day of February, 1921, at about noon time, the Steamship "Enterprise" then undergoing repairs at the yard of the respondent, Moore Shipbuilding Company, the libelant in the District Court, was let down stern foremost off of a marine railway into the waters of the Estuary for the purpose of putting her in a dock near the railway. The Tug "Relief" belonging to the respondent, Rolph Navigation & Coal Company, the third party respondent in the District Court, had a line fast on the stern of the "Enterprise" which was pointing towards the South shore of the Estuary with her bow towards the North shore. The Tug "Hercules", also belonging to respondent, Rolph Navigation & Coal Company, had a line fast on the starboard bow. The "Relief" had swung around from the stern to the port quarter of the "Enterprise" and was taking the sternway off of that vessel. The

Ferryboat "Thoroughfare", belonging to the petitioner, Southern Pacific Company, the claimant in the District Court, then approached at her full speed of thirteen knots an hour on an Easterly course through the Estuary and, when a considerable distance from the "Enterprise", sounded a single blast of her whistle which was not answered by the "Relief". When about one thousand feet from the "Enterprise", the "Thoroughfare" again sounded one blast of her whistle. The "Relief", then having taken off the sternway from the "Enterprise", answered with one whistle the second single blast from the "Thoroughfare" and the "Thoroughfare" then attempted to pass, still at full speed, between the stern of the "Enterprise" and the edge of the navigable channel on the South shore, for which there was room—a space of about one hundred feet.

The Tug "Union", not belonging to any of the parties to this action, was approaching the same space on a Westerly course down the Estuary and the "Thoroughfare" when about half way through the space, in attempting to avoid the "Union" swung to port and collided with the stern of the "Enterprise". At the time of the collision, the "Union" had slowed down and was about fourteen hundred feet westerly in the channel from the colliding vessels.

The late District Judge Dooling held, after exhaustive briefs had been filed, that under those circumstances, there was no obligation upon the part of the "Relief" to do anything other than to prevent such a change of position on the part of the "En-

terprise" as would interfere with the maneuver selected by the "Thoroughfare"; that the "Thoroughfare" advanced towards the one hundred foot space at full speed without knowing what she might encounter on the other side, and that the collision was caused by the "Thoroughfare" turning to port before she had cleared the "Enterprise" in order to avoid meeting the oncoming "Union".

The "Thoroughfare" then filed a petition for reargument which was granted by District Judge Kerrigan and the case was reargued thoroughly, both orally and by briefs. Judge Dooling's decision was affirmed.

On appeal, the case was argued orally and five briefs were filed. The Circuit Court of Appeals refused to hold, among other things, that the absence of a lookout on the "Relief" and the "Enterprise" was gross negligence, or that if one had been present the accident would not have occurred. It refused to hold, among other things, that the signal from the "Relief" for the approaching "Thoroughfare" to pass the stern of the "Enterprise" was a violation of the "Relief's" duty to protect the "Enterprise" and the men on her and the "Thoroughfare", from the collision which was inevitable, after the "Thoroughfare" was told that it was safe to pass and attempted to pass with the unseen "Union" coming towards the opening. It refused to hold, among other things, that it was gross neglect for the "Relief" not to have blown the danger signal of four whistles as she saw the "Thoroughfare" approaching the opening. It did hold, in adopt-

ing Judge Dooling's opinion, that no obligation was placed upon or assumed by the "Relief", to do anything other than to prevent such a change of position on the part of the "Enterprise" as would interfere with the maneuver selected by the "Thoroughfare"; that the collision was caused by the "Thoroughfare" turning to port before she had cleared the "Enterprise" in order to avoid meeting the oncoming "Union". The Circuit Court of Appeals construed Judge Dooling's opinion as holding, or in any event that Court held, that the "Thoroughfare" was guilty of negligence:

First: In failing to stop or reduce her speed when her first signal was unanswered.

Second: In attempting to pass through the one hundred foot opening at full speed.

Third: In attempting to pass through such opening without making the slightest effort to ascertain whether she might encounter another vessel after passing the "Enterprise".

Fourth: In directing her course to port before she had fully cleared the "Enterprise", and further that such negligence was the proximate cause of the collision. (Opinion, Record, pp. 401 to 407.)

On page 3 of the petition, it is stated that "there are no references to the evidence in this petition which is confined to the findings of fact and conclusions of law in the opinion". This is not a correct statement, as the "Thoroughfare" claims that the Court erred in its findings of fact, such claim necessitates reference to the evidence, if any attempt is made to urge

that contention seriously. The same claim was made in the Circuit Court of Appeals but in slightly different form. (Record, p. 404.)

> "None of the errors relied on here raise any question as to any of the facts found in Judge Dooling's opinion. They have to do with the conclusions of law which he drew from these facts, and with other facts not found by him, because the conclusions of law (erroneous, we believe) from those actually found, made it necessary. Hence we are not faced with any presumption in favor of the decree arising from presenting the evidence (in part) in open court."

Although that claim was made in a casual manner in the "Thoroughfare's" brief, the Court felt compelled to single out that erroneous passing comment and expressly stated that it was unable to agree to that proposition. (Record, p. 404.)

PETITIONER'S CAPTION: "THE STATEMENT OF QUESTIONS INVOLVED IN THE PETITIONS".

The representation is made under the above caption, on page 4 of the petition, that it is justified under claim of securing "uniformity of decisions in subordinate courts of appeal and to decide questions of general public importance which are not well settled." (Chief Justice Taft, VIII Am. Bar Assn. Journal 603.)

This is accomplished by first asking the question whether there has been an abandonment of the *"F. W. Wheeler"* rule that a vessel owes a positive duty to an approaching steamer signaling for a passing maneuver

to warn the latter of a danger known to the former and unknown to the latter. The erroneousness of this lies in the assumption made, as if there were no doubt about it whatever, that the "Wheeler" case does establish such a rule. The error in the second part of that question lies in the assumption that the Court held that the damage was "caused" by the attempt of the "Thoroughfare" to escape the approaching "Union". The Circuit Court of Appeals clearly stated all of the negligent acts which caused the collision and even if the statement by Judge Dooling were singled out and considered separately from the remainder of the opinion, the reasonable construction of it would be that the turning to port of the "Thoroughfare" before she had cleared the "Enterprise" in order to avoid the "Union" was the immediate and direct cause and that the proximate cause of the collision was due to the negligence of the "Thoroughfare", principally in running at full speed for the narrow opening.

Furthermore, Judge Dooling did not find that it was necessary for the "Thoroughfare" to turn to port before she had cleared the "Enterprise". He merely found that she did, but whether necessarily so was not decided.

Over and above all of that, the question entirely overlooks the rule that it is elementary that the faults causing the collision are not those at the moment of impact but those prior acts which lead the vessels into the position where the impact occurs.

The America, 92 U. S. 432, 437; 23 L. Ed. 724, 726;

The Genevieve, 96 Fed. 859, 860;

The Transfer No. 10, 137 Fed. 668;
La Boyteaux, Rules of the Road, pp. 7 and 8.

The error in the second question on the same page lies in the assumption that some question has been raised as to the correctness of the rule laid down in the "Ariadne" case. There is nothing in the "Thoroughfare's" petition showing that the rule there stated has been abandoned by the Courts in this case, or that it has ever been disputed. Neither has it ever been disputed by the "Thoroughfare" in this case that the absence of a lookout will not be held a fault where none was needed, or where the presence of one would not have availed to prevent the collision. There must at least be some causal connection between a collision and the absence of a lookout and it has frequently been held that, under the circumstances of particular cases, the absence of a lookout was immaterial.

The Admiral Farragut, 77 U. S. 334;
The Blue Jacket, 144 U. S. 371;
The George Demois (C. C. A.), 53 Fed. 833;
In re Eastern Bridge Co., 159 Fed. 541, 548.

In the *Ariadne,* 13 Wall. 475, relied on by the petitioner, the steamer was navigating at night in waters near the city of New York and failed to discover a brig until it was too late to avoid a collision with her, notwithstanding the fact that according to the steamer's own testimony, the brig could have been seen one-eighth of a mile away without any lights on the brig. The lookout did not see the brig at all until his attention was called to her by the mate, almost at the moment of the collision. Naturally, the Court was

compelled to hold that the collision was due to an insufficient lookout.

It presents purely a question of fact and in the present case, two district judges and four judges of the Circuit Court of Appeals have held adversely to the petitioners on the question of the absence of a lookout.

This weak contention, implied rather than asserted under petitioner's second interrogatory is sought to be bolstered up by asking the further question (Pet. p. 5): "May an Admiralty Court ignore the absence of a lookout on a steamer obstructing a narrow channel where (1) the commands affecting her are given by the captain of a tug, on her port side, who cannot see what is happening on her starboard side?" This question ignores the fact that the "Relief" had just swung around from the stern of the "Enterprise" where the "Relief's" captain had a clear view of what was happening on her starboard side.

The second and third sub-interrogatories, in support of the second main interrogatory, are couched in language which by the use of some well chosen words carefully framed, create an impression of circumstances which necessitated a lookout. But the fallacy in both is that they ignore that even if a lookout had been present on the "Enterprise" he could not have done more than to tell the captain of the "Relief" that which the captain already knew, namely that the "Union" was approaching on a westerly course down the channel. In fact, all three of these sub-interrogatories in support, merely raise the original question

of whether the captain of the "Relief" was required under those circumstances, regardless of whether they were reported to him by a lookout or otherwise known by him, to sound the danger signal to the "Thoroughfare".

As no cases have been cited by petitioner establishing any such duty, and as the question of fact in regard to a lookout not only falls to the ground on petitioner's own statement but is not a proper matter to raise on a petition for certiorari, the conclusion is irresistible that the sole object of the petitioner is "merely to get another chance to have questions of importance to them but not of importance to the public passed upon by another court." (8 Am. Bar Assn. Journal, 603.)

On page 6 of the petition, reference is made to a drawing on page 7 which is claimed to illustrate the positions of the approaching "Union" concealed from the "Thoroughfare" and "Relief" by the "Enterprise", but it is apparent that the drawing illustrates only the situation as petitioner would like to have it and not as it actually was. For example, the "Thoroughfare" is represented as being on a course through the channel just to the Southerly side of the center, whereas the evidence shows that she had hauled over to the South bank. (Record, pp. 228, 240, 255.) The stem of the "Enterprise" is represented as being approximately two hundred feet from the North bank, while as the evidence shows, the channel was five hundred feet wide, and if the "Enterprise" was only three hundred and twenty feet long as estimated (Record, p. 139), this with the one hundred foot space

between her stern and the South bank, would leave her stem about eighty feet from the North bank. One estimate was ten or fifteen feet, when the "Thoroughfare" was about one hundred and fifty feet from the "Enterprise". (Record, pp. 318, 320.) The probability is that her stem was being held in close to the dock on the North bank, otherwise the "Union" would not have crossed over to the South side of the channel towards the one hundred foot space at the stern of the "Enterprise". The "Union" also is represented as proceeding just Southerly of the center of the channel, whereas the testimony shows that she was just off of the oil wharves from the Southerly side of the channel. (Record, p. 132.) It was for that reason that the "Thoroughfare" passed to starboard of the "Union". (Record, p. 183.) The position of the "Union" in reference to her distance from the "Enterprise" is incorrect. The "Thoroughfare" is supposed to be one thousand feet from the "Enterprise" in the diagram and the "Union" is represented as being considerably less than that distance at that time. The testimony of the "Union's" captain is that after that time, and when the vessels were in collision, the tug "Union" was above the Howard Bunkers (Record, p. 207), which according to the chart offered in evidence (Record, pp. 102, 210) were fourteen hundred feet from the point of collision. So that at the time that the "Thoroughfare" was one thousand feet from the "Enterprise", the "Union" was considerably more than fourteen hundred feet from that vessel. If the position of the "Union" were correctly represented

on the diagram, it would be past the margin of the diagram on page 7 of the petition.

The notes under the diagram on that page are also misleading and particularly the assertion that the "Wheeler" case held that *in such a situation,* the tug does owe such a duty to warn the approaching vessel of the hidden danger. The words "that in such a situation" refer to the circumstances in the "Wheeler" case and not to circumstances similar to those set out in the diagram, as inferred by the note.

PETITIONER'S CAPTION: "ON A VESSEL'S DUTY TO WARN OF HIDDEN DANGERS".

Before taking up the petitioner's contention under the above caption on page 6 of the petition, we will call attention to another argument typical of the kind used by the petitioner throughout this whole case. On page 8 of the petition, part of the Circuit Court of Appeal's opinion is printed, including the statement "The 'Thoroughfare' when about one thousand feet from the 'Enterprise' sounded one blast of her whistle which signal was not answered. A few minutes thereafter, the 'Thoroughfare' sounded a second passing signal which was accepted with one blast from the 'Relief'." This is followed up by the assertion on page 10: "the opinion then finds the 'Thoroughfare' solely at fault for approaching and attempting to pass through this opening where 'there was room for her to pass' at a full speed which speed is found by the opinion to be less than one thousand feet' in a 'few minutes'."

The argument is fallacious. In the first place, the excerpts quoted in the petition (pages 8, 9, and 10) pretend to set out "the pertinent portions of the opinion of the Circuit Court of Appeals". In the paragraph of the opinion omitted from the petition (immediately following the paragraph quoted on page 10 of the petition and immediately preceding the paragraph quoted in the center of page 9 of the petition) the Circuit Court of Appeals found as follows (Record pp. 405, 406):

> "(2) *From the time that the 'Thoroughfare's' second single blast was blown* and was answered by the 'Relief', there was no change in the position of the 'Enterprise'. *For at least one thousand feet thereafter the 'Thoroughfare' advanced practically at right angles to the 'Enterprise'* heading for the 100-foot opening between the stern of the 'Enterprise' and the edge of the channel and so advanced at full speed without knowing what she might encounter on the other side of the 'Enterprise', after passing through the narrow opening. During all of this time, the 'Enterprise' was at rest and so remained until struck by the 'Thoroughfare'."

Thus it appears that the statement in the opinion that the "Thoroughfare" was 1000 feet from the "Enterprise" when she sounded the first whistle was either an oversight or a misprint. Furthermore, even if petitioner's own method of logic be adopted, its conclusion is incorrect. If the "Thoroughfare" was 1000 feet away from the "Enterprise" when she sounded the first whistle and 1000 feet away when she sounded the second whistle, her speed through the water between the time of the two whistles was nothing—not five knots per hour. The statement in the

opinion on the immaterial point as to the distance of the "Thoroughfare" when the first whistle was sounded is not at all likely to mislead the shipping world. Certainly it would not have as strong a tendency to mislead as petitioner's argument on the point.

Over and above that, an admission in two District Courts and the Circuit Court of Appeals that a vessel was at all times running at her full speed of thirteen knots an hour (Record, p. 233) cannot be successfully controverted for the first time when the case comes before the Supreme Court on a petition for writ of certiorari.

Coming now to the principal contention of the petition under this caption, the alleged rule is stated in part in large type on page 6 of the petition:

> "The whistle acceptance of a tendered passing signal is a positive assertion that no danger exists which is known to the accepting vessel and concealed from the vessel signaling for the maneuver. If there is such a danger, the vessel knowing it owes a positive duty to the asking vessel to blow the danger signal."

It is further asserted that a vessel accepting a passing signal with such knowledge is in fault; that a tendering vessel may rely upon such supposed assurance and that the rule laid down in this case is contrary to the rule established in other Circuits. The petitioner's statement of the rule is misleading in that it leaves out a very essential part of the rule as established by the cases cited in the petition which, framed in the petitioner's own words should read as follows:

> "The whistle acceptance of a tendered passing signal is a positive assertion that no danger exists *because the accepting vessel is unable to carry out her agreed maneuver by reason of an obstruction or other inability to control her own movements or those of her tow* which is known to the accepting vessel and concealed from the vessel signaling for the maneuver."

This fully appears from a fair statement of the cases cited by the petitioner in support of the rule as claimed by it.

The case of the *F. W. Wheeler,* (C. C. A.) 78 Fed. 824, is set out in such a way in the petition as to make it appear that the "Wheeler" was held liable for not warning the approaching "Chamberlain" that the former's tow, the "Ashland", was sheering. That is not correct, but even if it were, it would in no way be helpful to the petitioner, for the reason that the holding would be that the "Wheeler" was in fault for not sounding the danger signal when she was unable to control the movements of her tow. The truth is that the Court observed in passing that if the "Wheeler" and her tow, the "Ashland", were aground as claimed by the "Wheeler", she would be liable anyhow because she was erroneously carrying two bright white mast head lights and the red and green side lights, as if both vessels were under way; that if she so mislead the approaching vessel it was negligence on her part to have accepted a passing signal from the vessel.

As before observed, that statement as the law of the case, could not help the petitioner, for as appears from the excerpts quoted on pages 11 and 12 of the peti-

tion, the Court held that if the facts were as contended by the "Wheeler", she would be negligent "in accepting a passing signal *when unable to control her own movements or those of her consort*". Note particularly the language of the excerpt quoted on page 12 of the petition just prior to that part thought to be most favorable to the petitioner set out in large type. "The inability of the 'Wheeler' *to control her movements or those of her consort* which had sheered across the course of the vessel coming down * * *." But in addition to that, both the trial Court and the Appellate Court found that neither the "Wheeler" nor her tow, the "Ashland", was aground when she answered the signal from the approaching "Chamberlain". The ruling in the case was that the "Wheeler" was negligent in not stopping when her tow began to sheer, or in not throwing off the tow line sooner; that the "Ashland" was guilty of negligent navigation in not preventing the sheer.

We deny, as alleged, that it was argued by us that the *F. W. Wheeler* rule did not apply because the duty there described, by way of dictum, was to disclose the presence of a different kind of a concealed danger, to wit, a sheering tow instead of an oncoming steamer. We argued that the dictum in the *F. W. Wheeler* case did not apply because the duty there described was to disclose the inability of the "Wheeler" to control her own movements or those of her tow instead of to disclose the presence of a third vessel which might make dangerous the maneuver selected by the approaching vessel.

On page 13 of the petition, it is asserted that in the *Edna V. Crew,* 182 Fed. 890, a third vessel made the agreed maneuver dangerous to the tow and the approaching vessel who blew the first whistle just as the "Union" made it dangerous to the "Enterprise", the tow, and the "Thoroughfare", the approaching and signaling vessel. The statement is misleading in that it strongly intimates that the "Crew" was held liable for advising the "Portsmouth" that there would be no obstruction to her passing on the starboard side of the "Crew". The truth is that the "Portsmouth" and the "Crew" were approaching on opposite courses and the "Portsmouth" sounded a two-blast signal to pass starboard to starboard. The "Crew" accepted the two-blast signal which placed upon her, as held, the duty to facilitate the safe passing by going to port. The "Crew", however, only went about half a point to port until the collision was imminent and she was held liable for not giving sufficient room, as she should have done by swinging further to port. So that the excerpt from the opinion quoted in the petition, in the light of those facts, means simply that where vessels are approaching head on and the first vessel accepts a passing signal from the second vessel, such an acceptance places the duty upon the first vessel to swing to port or starboard, as the case may be, and it further operates as an assurance that there is no obstruction which would prevent the *first* vessel from carrying out that duty placed upon her. The acceptance does not operate as an assurance to the *second* vessel that there are no obstructions which would prevent the *second* vessel from passing upon the port or

starboard side of the *first* vessel according to the selection made by the *second*.

Note the language quoted in the excerpt on page 14 of the petition, immediately following that part set out in large type "and in any event by reason of the 'Dixie' being to her port she could not have starboarded and gone further to the north". The word "her" refers to the "Crew" and not to the "Portsmouth". The presence of the third vessel, the barge, prevented the "Crew" from carrying out her (the "Crew") agreed maneuver. The third vessel did not, as represented, prevent the "Portsmouth" from carrying out her (the "Portsmouth") agreed maneuver, nor did the Court hold the "Crew" liable for not warning the "Portsmouth" that the presence of the third vessel would prevent the "Portsmouth" from carrying out her (the "Portsmouth's") agreed maneuver.

As opposing proctor correctly states on page 15 of petition, the

> "significant language is 'the sounding of the two reply whistles clearly indicated that there was no obstruction which would have prevented *her* accepting the "Portsmouth's" signal to pass starboard to starboard'."

It is a clever but incorrect application of that language to say (Petition, p. 15):

> "So, in this case, the sounding of the one reply whistle clearly indicated that there was no obstruction which would have prevented the 'Relief' accepting the 'Thoroughfare's' signal to pass port to port."

Proctor's ingenuity is evidenced more by what the assertion implies than by what is expressly stated. In

the present case, the vessels were not meeting end on as implied, but the "Thoroughfare" was approaching at right angles to the port side of the "Relief". The "Relief" was holding her tow, the "Enterprise", dead in the water, and consequently she was a privileged vessel. In such a situation, she had the rights of a vessel at rest or at anchor in respect to all vessels which were moving.

The Col. John F. Gaynor, (C. C. A.) 130 Fed. 856;

Briggain S. S. Co. v. King Trans. Co., (C. C. A.) 131 Fed. 62;

The Lucile, 169 Fed. 719.

The "Relief" was the privileged vessel for the further reason that she was burdened with a cumbersome tow and it was the duty of the "Thoroughfare" to do what was necessary to avoid a collision with her.

The Jamestown, 114 Fed. 593;

The Westhall, 153 Fed. 1010 (and cases cited on page 1013).

What proctor should have said was:

> "So in this case the sounding of the one reply whistle clearly indicated that there was nothing which would render the 'Relief' incapable of preventing such a change of position on the part of the 'Enterprise' as would interfere with the maneuver selected by the 'Thoroughfare'."

It does not appear why the case of the *Lowell M. Palmer,* (C. C. A.) 142 Fed. 937, was cited in the petition and merely an excerpt from the opinion is quoted on page 16. In that case, the "Wrestler" accepted a passing signal from the "Palmer". The flood tide

prevented the "Wrestler" from carrying out her agreed maneuver and consequently she ran into the "Palmer". The "Wrestler" was held liable for agreeing to the maneuver when she could not control her own movements or the car float which she was towing.

By a careful framing of its argument and the use of certain excerpts from the opinion in the case of the *Richmond*, 275 Fed. 970, an atmosphere is created in the petition, pages 16 to 18 inclusive, that would lead the reader to believe that the Steamer "Hawarden" was held liable because she did not warn the schooner "Richmond" of the presence of other vessels. There is no such ruling in the case and what is more, in our opinion, that case is squarely against the petitioner. The truth is that the steamer was held liable for not having a proper lookout and for proceeding at a dangerous rate of speed under the circumstances, the circumstances being the presence known to those in charge of the steamer's navigation of other vessels in the channel. This ruling is particularly applicable to the navigation of the "Thoroughfare" in proceeding at a dangerous rate of speed through a narrow channel with a tug and her tow lying squarely across the channel in front of her, known to be so lying by those in charge of the "Thoroughfare's" navigation and notwithstanding those circumstances proceeding under full speed ahead for a small opening between the stern of the vessel and the edge of the channel.

In the *Alabama,* 114 Fed. 214, 218 (Petition, p. 19), the sentence of the opinion immediately preceding that part quoted in the petition reads as follows:

> "Upon reaching Nottingham and Wrenn's Wharf, and finding its pathway in part obstructed by an anchored vessel, which necessarily threw it further to mid channel, the tug ought not to have attempted at that place, under such circumstances, to have still further obstructed the channel *by sheering the barge of its tow in collision out to anchor as it did.*"

Thus it appears that the tug was held liable for sheering its tow directly in the path of an approaching vessel and not for failing to give warning to the approaching vessel that the maneuver selected by such vessel might be dangerous because of the presence of a third vessel.

The short excerpt from the opinion of the *Luther C. Ward,* 149 Fed. 787 (Petition, p. 19) seems to have been inserted in the petition for the purpose of permitting the inference that, from a full reading of that case, it would appear to be an authority for the assertion that if the "Relief" regarded the "Thoroughfare's" proposed maneuver as faulty, the "Relief's" captain should have blown alarm whistles, stopped the proposed passing and compelled the "Thoroughfare" to "go about, or otherwise dispose herself". The facts are that the "Ward" and the "Tice" were approaching head on and the "Ward" accepted the two-blast signal from the "Tice" at a time when she (the "Ward") was not able to alter her course when agreed and did not so alter it thereafter until she had gone quite a distance. Naturally if the "Ward" voluntarily placed the burden on herself of immediately starboarding her helm she could not blame the other vessel for her action in that

regard, because as the Court pointed out, she was under no obligation to accept the signal. There is nothing in the case which seems to indicate that the acceptance of the two-blast signal from the "Tice" operated as an assurance to the "Tice" that she could safely pass to the starboard of the "Ward". In fact the "Tice" was not injured, nor was the collision with the "Tice", but was between the tow of the "Ward" and a dredge anchored in the channel.

The same procedure is followed in the quotations from the two cases set out on page 20 of the petition, the *Werdenfels,* 150 Fed. 400 and the *Santa Maria,* 227 Fed. 156. In the first case, the tug was held liable for failing to carry out a maneuver which she had agreed upon because of the strong tide which was running. In the second case, the tug was held liable for accepting a port to port passing signal which she could not carry out by reason of her being in the middle of the channel and having a large vessel in tow. The only answer to such arguments lies in a reading of the cases.

On page 20 of the petition is the statement that the proctors representing the three groups of parties have not been able to find any case where a vessel has not been held in fault, where she has accepted a passing signal and failed to blow a danger signal to indicate a danger known to her and unknown to the vessel requesting the passing maneuver. What weight should be given to this statement is not explained. It is equivalent to an assertion that any alleged rule of law which proctor is pleased to frame is subsisting and valid unless the opposing proctors can find a case

where such a rule was asserted and the Court held adversely to it. Certainly there is no such burden until a case is found which has at least a tendency to support the alleged rule. The statement is framed in such language as to be correct as a general rule, but it is sufficiently indefinite, vague and uncertain as to make it appear to cover the circumstances in the present case. This is accomplished by a play on the word "danger". If the word "danger" is restricted to meaning the inability of a vessel to control her own movements, it is correct. If it is restricted to meaning that a maneuver selected by an approaching vessel might be made dangerous because of the presence of a third vessel, the statement is incorrect. As pointed out, however, the carefully chosen language used to state the rule by the petitioner fits either situation.

The rule laid down by the Circuit Court of Appeals for the Ninth Circuit in this case, in so far as it concerns the contention of the petitioner under discussion, is that where a steamer observes a tug with her tow lying still across a channel and the steamer signifies her intention to direct her course to starboard, which signal is accepted by the tug, such accepting signal places no obligation upon the tug to do anything other than to prevent such a change of position on the part of the tow as would interfere with the maneuver selected by the steamer; that there is no obligation upon the tug to warn the steamer that the maneuver selected by it might be made dangerous through the presence of a third vessel. That is sound law and is in full and complete harmony with the cases cited by the petitioner. Certainly it cannot be said with any

show of reason that it is in conflict with those decisions.

On the other hand, this decision may be compared favorably with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Atlas Transportation Co. v. Lee Line Steamers,* 235 Fed. 492; rehearing denied, 238 Fed. 349; certiorari denied, 243 U. S. 643. In that case, the "Cook" was ascending the Mississippi River towing four barges, two of which were lashed end to end straight ahead, and the other two made fast on each side of the "Cook". *The "Lee" was also proceeding up the river and blew two blasts of its whistle to pass the "Cook" on the port side and the "Cook" answered with two blasts.* At that time, the vessels were in a part of the river which was dangerous by reason of shoal water, bends, sand bars and the narrowness of the channel. The "Lee" attempted to pass at its full speed but, because of the shoal water, it was difficult to make it respond to its helm, and, consequently, it came into collision with one of the barges towed by the "Cook". The trial Court found that the collision was an accident without fault on the part of the "Lee". That decision was reversed by the Circuit Court of Appeals on the ground that the "Lee" assumed the risk in passing, and that the assent of the "Cook" to the passing signal merely expressed an understanding by the "Cook" of what the "Lee" proposed to do, and an agreement not to thwart it.

> "It is claimed that the Josh Cook was at fault because it answered the Rees Lee's signal by two blasts of its whistle and that this was *an assurance of the safety of the attempted maneuver,*

whereas it should have responded with the danger signal." (page 495.)

The Court quoted the rule of the road requiring an overtaking vessel to keep out of the way of the vessel being passed and also Rule 8 of the Pilot Rules for the Mississippi River, including the provision that if the steamer ahead does not think it safe for the overtaking steamer to attempt to pass at that point, she shall immediately signify the same by giving not less than four short and rapid blasts of the whistle. It was then held as the law of the case (pages 495, 496):

> "Under these rules, the Josh Cook had the right and the duty to hold her course. It was not its duty to keep away from the Rees Lee, unless a collision should become imminent. The Rees Lee had the right to pass the other boat, if it could do so with safety to both. *It had to be its own judge as to the matter of safety, as whatever risk attended its passage from the narrowness of channel, the shallowness of water, the current, suction, or other causes, except the fault of the Josh Cook, was assumed by the Rees Lee. The reply of the Josh Cook to the passing signal of the Rees Lee was no more than an assent to it, at the risk of the vessel proposing it.* It expressed an understanding of what the Rees Lee proposed to do, and an agreement not to thwart it; but the success of the maneuver was at the risk of the Rees Lee. Spencer on Collisions, Sec. 71; Whitridge v. Dill, 23 How. 448, 454, 16 L. Ed. 581; The Great Republic, 23 Wall. 20, 32, 23 L. Ed. 55; The Atlantis, 119 Fed. 568, 571, 56 C. C. A. 134; The Mesaba (D. C.) 111 Fed. 215, 221, 223; The Nereus (D. C.) 23 Fed. 448, 455; The Greenpoint (D. C.) 31 Fed. 231, 232; The Charles Morgan (D. C.) 6 Fed. 913, 914; The Canisteo (D. C.) 47 Fed. 908, 910; The Ruth (D. C.) 178 Fed. 749, 751; The Henry W. Oliver (D. C.) 202 Fed. 306, 310; The Fred

Jansen, 49 Fed. 254, 255, 1 C. C. A. 238; Standard Oil Co. v. The Garden City (D. C.) 38 Fed. 860, 862; The Aurania and the Republic (D. C.) 29 Fed. 98, 125; The City of Springfield (D. C.) 29 Fed. 923, 925; The Edward Smith, 135 Fed. 32, 36, 67 C. C. A. 506; The Sif (D. C.) 181 Fed. 412, 415."

A petition for rehearing was filed praying that the damages should be divided and again urging that the "Cook" was negligent in whistling its assent to the "Lee's" passing at a dangerous place. The petition was denied on the ground that, under the pilot rule, the "Cook" by its signal of two whistles did not assent that the Lee could pass recklessly, but only that it could pass safely if properly navigated.

We deny that the cases cited on pages 21 and 22 of the petition were cited by us in support of the rule as laid down by the Ninth Circuit. They were cited in connection with the numerous collateral issues raised during the extended litigation of this case, or in answer to other arguments advanced by the petitioner.

PETITIONER'S CAPTION: "ANTICIPATION OF POSSIBLE ARGUMENT THAT ONCOMING 'UNION' WAS NOT 'PRESENT' AND DID NOT 'CAUSE' THE COLLISION."

We think it improper to discuss this issue, which has at all times been immaterial and which is admittedly immaterial to the proceeding in this Court. The erroneous statement of what was argued below should, however, be corrected. Our argument was that, disregarding the question of whether the

"Thoroughfare" was in fault for turning when she did, it is elementary that faults causing collision are not those at the moment of impact but those prior acts which lead the vessels into the position where the impact occurs. The third party respondent argued that, while the Court found that the "Thoroughfare" turned to port to avoid the "Union", there was no finding that it was necessary for the "Thoroughfare" to turn when she did, nor was it in fact necessary for the reason, first, that she could have proceeded further before turning, and, secondly, she could have stopped within three hundred feet according to her own testimony.

PETITIONER'S CAPTION: "BRIEF ON SECOND QUESTION AS TO THE ABANDONMENT OF THE LOOKOUT RULE IN THE ARIADNE CASE. THE ABSENCE OF A LOOKOUT RAISES A QUESTION OF CONTRIBUTIVE AND NOT PROXIMATE CAUSATION".

There has been no abandonment of the rule in the "Ariadne" case, and the rule there stated has never been disputed. Neither has it ever been disputed that the absence of a lookout is not negligence where none was needed or where his absence did not contribute to the collision. The questions of whether the circumstances required a lookout and, if so, did his absence contribute to the collision, are questions of fact. In this case, those questions of fact have been determined adversely to petitioner by two District Court judges and four judges of the Circuit Court of Appeals. The concurrent judgment of the two courts below that the "Relief" was not negligent will not be disturbed by

the Federal Supreme Court. The rule is well settled. (*Boehmer v. Pa. Railroad Co.,* 252 U. S. 496; citing *Chicago Junction Railway Co. v. King,* 222 U. S. 222.)

This is particularly true on a petition for writ of certiorari.

Furthermore, it is perfectly apparent that no lookout was needed to tell the captain of the "Relief" that which the latter already knew. Even if a lookout had been present and informed the "Relief's" captain of the presence of the "Union", that would only have raised the question of whether the "Relief" would have been bound under those circumstances to have warned the "Thoroughfare" of the possible consequences of her own negligent navigation.

The suggestion on pages 24 and 25 of the petition, that possibly the "Relief's" captain might have forgotten about the "Union", is without merit, in that the assumption is based upon nothing whatever, except possibility. Besides, both Courts expressly found that when the whistles were exchanged between the two vessels the master of the "Relief" was aware of the presence of the "Union".

Certain cases are cited on page 25 of the petition to the point that there should be a lookout on a tow which obscures the vision of the tug from approaching vessels, but no claim is made that in the present case the "Enterprise" obscured the vision of the "Relief" from the "Thoroughfare". Neither is any claim made that because the "Relief" could not see the "Union", though she knew of her presence, this in any way rendered the "Relief" incapable of preventing such

a change of position on the part of the "Enterprise" as would interfere with the maneuver selected by the "Thoroughfare". Furthermore, in the cases cited, the tugs were navigating on courses with tows. They were not lying still in the water.

An excerpt from the "Ariadne" case is again quoted on page 26 of the petition, as if its mere repetition would lend some force to the claim that the rule there stated had been abandoned in the present case, notwithstanding the fact that the corollary of the rule is ignored entirely. That case has already been discussed.

In the *Anna W.*, (C. C. A.) 201 Fed. 58 (petition, pages 27 and 28) it was held that a sailing vessel is required to keep her course until she is reasonably certain whether the approaching steamer is going to pass on her starboard or port side, and that the sailing vessel has no right to assume what course the steamer will take, and change her course, until that time; that it was then the sailing vessel's duty to act promptly, which the master could not do if he had no lookout to keep him informed at that critical moment.

In the *International*, 143 Fed. 468 (petifion, p. 28) a small yacht was held liable for, among other things, not having a lookout when drifting helplessly with the tide at night, through a busy channel and in the way of large ships.

There is no justification for the statement that (petition, p. 28):

> "The mere finding that the "Thoroughfare's" act is the *proximate* cause does make it the *sole*

> cause and does not absolve the court from considering whether the absence of a lookout was not a contributing cause."

The Circuit Court of Appeals held that the gross negligence of the "Thoroughfare" in the various particulars mentioned in its opinion (Record, p. 407):

> "was the proximate cause of the collision and that the 'Thoroughfare' was solely responsible for the damages which resulted therefrom. Negligence is the base of the action in each of the two cases and on this issue, the trial court held the appellant liable and we think rightly so."

This necessarily excludes the idea that the absence of a lookout was also a contributing proximate cause. The inference that the Circuit Court of Appeals failed to consider that question is wholly unwarranted as that Court expressly pointed out that there were fifteen assignments of error in the *Moore* case and fourteen in the *Haglund* case, including the error claimed, that the absence of a lookout on the "Relief" and the "Enterprise" was gross negligence; and that if one had been present, the accident would not have occurred. That Court then stated that it had carefully reviewed the testimony and considered each of the assignments of error. No mention was made of the absence of a lookout in the District Court's opinion for the reason that that claim was abandoned by the petitioner in its briefs filed in that Court.

In this connection, we again call attention to the rule, as we have done heretofore throughout the entire case, that where the fault on the part of one vessel is established by uncontradicted testimony and such

fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. The foregoing rule was firmly established in the leading case of the *City of New York,* 147 U. S. 72, and subsequent decisions have strengthened that rule instead of qualifying or restricting it in any way. Among such decisions are those of this Court in the cases of *The Oregon,* 158 U. S. 186, *The Umbria,* 166 U. S. 404 and *The Victory,* 168 U. S. 410.

PETITIONER'S CAPTION: "THE CONTRADICTORY FINDINGS OF FACT IN THE OPINION ARE FURTHER EVIDENCE THAT THE WHOLE CASE WAS ONLY CASUALLY CONSIDERED BELOW.

Reply has been made to the matters set out under this caption (petition, page 30) in exposing another fallacious argument, but the same matters are urged as a basis here for a different contention. It only serves as an additional illustration of the extremes to which the petitioner is driven. The argument is that it is a matter of certiorari that the Circuit Court of Appeals found in its opinion that the vessels were one thousand feet apart when the first whistle was blown by the "Thoroughfare" instead of approximately twenty-five hundred feet according to the evidence, which finding is inconsistent with another finding that the vessels were one thousand feet apart when the

"Thoroughfare" sounded the second whistle. It takes the following form.

> A statement by the Court, inconsistent with another statement, is found only in casually considered cases.
>
> A statement by the Court in this case is inconsistent with another statement.
>
> Therefore this case was only casually considered.

The major premise in the above proposition is the underlying doctrine of petitioner's argument, when divested of its surplus verbiage and reduced to its generic terms. Proctor for petitioner would himself point out its glaring unsoundness in no uncertain terms, if we attempted to apply it to some of the inconsistent contentions made in this case. Suffice it to observe that it is immaterial whether the "Thoroughfare" was one thousand feet or twenty-five hundred feet (Record, p. 215) from the "Enterprise" when the "Thoroughfare's" first signal was sounded and unanswered by the "Relief", except to show that the "Thoroughfare" was negligent in not stopping or slowing down her engines at that time.

CONCLUSION.

Here is a case where a vessel, confessedly guilty of four different acts of negligence, came into Court and argued that the other vessel should be held liable for half of the damages caused by the collision on mere criticism of the management of the other vessel; criticism based only upon the suggestion that possibly the

other vessel might have taken some action which would have avoided the consequences of the acts of gross negligence committed by the first vessel. Failing in its defense, it requested another district judge to hold that the judge who heard the case, erred in not sustaining its contention.

On the second failure, another attempt was made to defeat the right of the injured parties to recover the damages caused by its negligence, and appeal was taken to the Circuit Court of Appeals. Notwithstanding that that Court found the facts, and the law applicable thereto, clearly and unequivocally, the owner of the negligent boat, the petitioner herein, now asserts that the case is a proper one for review in this Court.

Two contentions are made, upon which that claim is based. First, that the absence of a lookout on the "Enterprise" was negligence contributing to the collision, and, second, that the "Relief" should have warned the "Thoroughfare" of the possible consequences of the latter's negligent navigation.

It is claimed that the determination of these questions is vital to the interest of the general public and that the rulings on those points by the Circuit Court of Appeals for the Ninth Circuit in this case, are contrary to decisions in other Circuits.

On the first question, there is no showing whatever in the petition that the two lower Courts erred in failing to find as a fact, that a lookout was necessary, or that the absence of one contributed to the collision. Neither is it pointed out what interest the general

public has in the question of whether under the circumstances of a particular case, a lookout was or was not needed, or the absence of one did or did not contribute to the collision. The rule in reference to lookouts not having been disputed, it could hardly be said that the decision of one Circuit Court of Appeals, finding as a fact that a certain case came on the positive or the negative side of the rule, created a conflict in the decisions of the various Circuit Courts of Appeals.

There has been absolutely no authority cited by petitioner establishing, or even tending to establish, a rule under which the "Relief" was bound to warn the "Thoroughfare" that the maneuver selected by the latter might be made dangerous through the presence of a third vessel. In fact, the only case in the books, where a similar contention was made, is in entire harmony with the decision in the present case.

Moreover, it is apparent that any such rule would have to contain a clause limiting its operation to approaching vessels which were being navigated with due care. As so framed, it would be incorrect for the reason that the assenting vessel only assures such an approaching vessel that there is no danger in so far as the ability of the assenting vessel is concerned with respect to the discharge of the obligations, resting upon her. The assumed rule, even with only the first qualification, would not be at all inconsistent with the present case. Neither would it present a question of interest to the general public, as it would only raise the issue of whether the "Thoroughfare" was

being navigated with caution just prior to the collision.

Dated, San Francisco,
September 12, 1927.

Respectfully submitted,
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